

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-1218

B
P/S

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

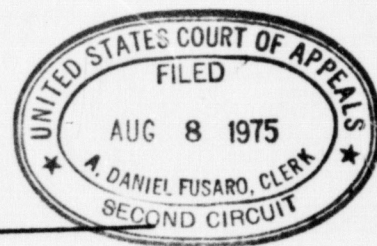
RICHARD WIENER,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

APPENDIX FOR DEFENDANT-APPELLANT

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75 CRIM. 368

JUDGE

4/9

UNITED STATES COURT OF APPEALS
FILED
JUN 19 1975
DANIEL FUSARO, CLERK
SECOND CIRCUIT

DATE	PROCEEDINGS
11-75	filed indictment. (Related to 75 Cr 125 and referred to Wyatt, J.)
4-14-75	Deft. Richard Wiener - Suppression hearing held before Palmieri, J.
4-15-75	Suppression hearing continued & concluded. Deft. pleads not guilty. Trial begun with a jury as to deft. Richard Wiener.
4-16-75	Trial continued.
4-17-75	Trial continued.
4-18-75	Trial continued. Summations & charge. Jury deliberating. Jury finds the deft. on counts 1 & 2, and guilty as to possession only on count 3. Sentence 6-3-75 at 4:30 P.M. Pre-sentence investigation ordered. Deft. has until April 22, 1975 to post \$5,000 surety bond, 4:00 P.M. Bail limits - Southern District of New York and the State of New Jersey.....Palmieri, J.
4-22-75	RICHARD WIENER-Filed Govt's, evidence memorandum I.
4-23-75	RICHARD WIENER- Filed the following papers rec'd from Magistrate Raby. (Mag. #75-603) Docket Entry Sheet - \$5,000 bond with Stuyvesant Ins. Co. 4-21-75 Appearance Bond. 5-19-75 Bonded by Stuyvesant Ins. Co. in the amt. of \$5,000

75-1518

PROCEEDINGS

STEVEN SILBERMAN, - Filed Molls Prosequi.

RICHARD WIENER-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for a period of TWO (2) YEARS on count one, TWO (2) YEARS on count two, and SIX MONTHS (6) on count three. Sentences imposed on each of count one, two and three are to be served CONCURRENTLY. AND The Deft. is FINED TWO-THOUSAND FIVE HUNDRED (\$2500.) DOLLARS on count one. The Deft. is FINED TWO-THOUSAND FIVE HUNDRED (2500.) DOLLARS on count two. The fines (Total: \$5000.) are to be paid by the deft. or the deft. is to stand COMMITTED until the fines are paid or he is otherwise discharged according to the law. Pursuant to Title 21, section 841, United States Code, the deft. is placed on SPECIAL PAROLE FOR A PERIOD of TWO (2) YEARS upon expiration of prison sentence. The deft. is continued on present bail (\$5,000 cash or surety to be rewritten) pending appeal.....Palmieri, J.
Issued commitment 6-4-75

RICHARD WIENER-Filed Deft's. appearance bond pending appeal in the sum of \$5,000.00-
Stuyvesant Insurance Co., acknowledged by the Clerk.

RICHARD WIENER-Filed deft's. notice of appeal from the Judgment of Conviction entered on 6-3-75. Mailed notice to: Richard Wiener, 215 E. 80th St., N.Y.C. and U.S. Attorney's Office.

A TRUE COPY
RAYMOND F. BERGAMOTT, Clerk
By *[Signature]* Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

UNITED STATES OF AMERICA

-v-

STEVEN SILVERMAN and
RICHARD WIENER,

Defendants.

: Supp. &
: INDICTMENT
: S 75 Cr. 368

The Grand Jury charges:

1. From on or about the 28th day of October, 1974 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, STEVEN SILVERMAN and RICHARD WIENER the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

(1) On or about the 30th day of October, 1974 the defendants STEVEN SILVERMAN and RICHARD WIENER left an apartment building at 215 East 80th Street, New York, New York.

(2) On or about the 30th day of October, 1974 the defendants STEVEN SILVERMAN and RICHARD WIENER went to the vicinity of East 81st Street and 2nd Avenue, New York, New York.

(3) On or about the 30th day of October, 1974 the defendant STEVEN SILVERMAN drove a Chevrolet Nova, bearing New York Registration #202-ZDG to the area of East 80th Street and 2nd Avenue.

(4) On or about the 30th day of October, 1974 the defendants STEVEN SILVERMAN and RICHARD WIENER while in the vicinity of East 81st and Second Avenue possessed approximately 40 pounds of hashish.

(Title 21, United States Code, Section 846)

COUNT II

The Grand Jury further charges:

On or about the 30th day of October, 1974 in the Southern District of New York, STEVEN SILVERMAN and RICHARD WIENER the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I controlled substance, to wit, approximately 40 pounds of hashish.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(B); Title 18, United States Code, Section 2.)

COUNT III

The Grand Jury further charges:

On or about the 30th day of October, 1974 in the Southern District of New York, RICHARD WIENER the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I controlled substance, to wit, approximately 198.1 grams of marihuana.

JAH:ee
74-3474

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B).)

FOREMAN

PAUL J. CURRAN
United States Attorney

JUDGMENT AND COMMITMENT

United States District Court for

THE SOUTHERN DISTRICT OF NEW YORK

United States of America vs.

DEFENDANT

EDWARD C. WINTER

DOCKET NO.

75 Crim. 366 RLP

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
June 9 1975☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSELFrederick P. Hafetz, Esq.
(Name of Counsel)☐ GUILTY, and the court being satisfied that there is a factual basis for the plea.☐ NOLO CONTENDERE☒ NOT GUILTYThere being a ~~guilty~~ verdict of☐ NOT GUILTY Defendant is discharged☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of: the defendant unlawfully and knowingly combined, conspired and agreed to unlawfully distribute and possess with intent to distribute Schedule I controlled substances, (ct. 1). The defendant did unlawfully possess with intent to distribute a Schedule I controlled substance, to wit, Heroin, (ct. 2). The defendant did possess a Schedule I controlled substance, to wit, Heroin, (ct. 3, the latter included offense). In violation of Title 21, United States Code, Sections 812, 811(a)(1) and 811(a)(1)(B), and 814, and in violation of Title 18, United States Code, Section 2.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared by the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on count one, TWO (2) YEARS on count two, and SIX (6) MONTHS on count three. Sentences imposed on each of counts one, two and three are to be served CONSECUTIVELY.

AND
The defendant is FINED TWO THOUSAND FIVE HUNDRED (\$2500.) DOLLARS on count one. The defendant is FINED TWO THOUSAND FIVE HUNDRED (\$2500.) DOLLARS on count two. The fines (Total: \$5000.) to be paid by the defendant or the defendant is to stand COMMITTED until the fines are paid or he is otherwise discharged according to the law.

Pursuant to Title 21, Section 811, United States Code, the defendant is placed on SPECIAL PAROLE for a period of TWO (2) YEARS upon expiration of prison sentence.

The defendant is continued on present bail (\$5000. each or surety to be reparation) pending appeal.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, the court hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other appropriate officer.

CERTIFIED AS A TRUE COPY OF

SIGNED BY

U.S. Magistrate

EDWARD L. PALMER

By _____ CLERK

COURT'S OPINION ON MOTION TO SUPPRESS

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And then thereafter took it upon himself--

THE COURT: He called the wife obviously as the result of a message which he got from a mutual friend and the distressed wife may have called up all over the place trying to get some help and the mutual friend could well have been either the wife of the attorney he was trying to find or someone else that the wife had sought out.

The evidence isn't clear about that and I don't think it would be justified to say that he was interloper. I am sure he went down there because he believed that this mutual friend had conveyed a message which came from the defendant. I am convinced of that.

MS. HARRIS: Very well, your Honor.

I just wanted to point out that one aspect of this in the testimony.

THE COURT: All right, the defendant Richard Weiner has moved to suppress tangible evidence taken from his apartment after his arrest on October 30, 1974, and there is a good deal of evidence in this hearing which has lasted over a day and a half concerning the events which took place at 215 East 80th Street where the defendant lived, shortly after his arrest, in the company of Stephen Silverman, the co-defendant.

He has not disputed the probable cause for his

1 eo:mg

2 arrest on the charges contained in the indictment. And
3 I pass that point since it is not moot.

4 The defendant has moved to suppress the tangible
5 evidence discovered in the apartment after a search was
6 allegedly conducted with the defendant's consent.

7 The defendant has also moved to suppress state-
8 ments taken at the DEA headquarters which the government
9 says were volunteered after full warnings to the defend-
10 ant and without a request by the defendant to see an
11 attorney or to stop the questioning and without an aware-
12 ness on the part of the questioning DEA agents that an
13 attorney had requested to see the defendant.

14 I deny the motion of the defendant with respect
15 to the suppression of the tangible evidence discovered
16 in the apartment, but I grant the defendant's motion with
17 respect to the suppression of the statements taken at
18 DEA headquarters.

19 I deny the motion on the first point because
20 I believe that the evidence of the government is suffi-
21 cient to establish by a preponderance of the credible
22 evidence, indeed beyond any question at all, that im-
23 mediately on his arrest Weiner was fully warned of his
24 Miranda rights and that he was warned again of his
25 Miranda rights after being placed in the agents' car for

1 going

2 transportation to their headquarters.

3 I believe the testimony to the effect that
4 while the car was on the way to the headquarters he was
5 asked to be taken to his apartment to assure himself that
6 the apartment door was secure and to tell his wife if she
7 had arrived in his absence of what had happened to him.

8 I don't reel that there was anything wrong or
9 deceitful or improper on the part of the agents to have
10 made a mental note to the effect that this might have
11 been an occasion which would have served them in some
12 proper way as a means to search the apartment.

13 The agents agreed and returned to the apartment
14 building at 215 East 80th Street and I accept the testi-
15 mony of Agent Powers as entirely credible that he asked
16 the defendant if he had any more drugs in the apartment
17 and to which the defendant responded, "If you can find
18 any, you can have them."

19 And that when Powers then said, "Does that mean
20 I have your consent to search the apartment, the defendant
21 again responded, "If you can find any, you can have them."

22 I regard this as a consent and indeed almost
23 as a gracious invitation to search the apartment and I
24 also conclude that during the entire time in the apartment
25 the officers displayed no force or they were not abusive

1 eo:ing

2 and they were not offensive in any way, and particularly
3 that Agent Powers was not abusive or offensive to Weiner's
4 wife.

5 When he walked into the half-open closet door
6 and discovered the burlap bag in which he found a quantity
7 of marijuana-like substance along with assorted smoking
8 materials and a loaded pistol and seized the bag, he was
9 acting legally and properly and not as a result of any
10 deceit, fraud, abuse or illegality.

11 When he left the apartment the evidence is clear
12 that the defendant asked to give his personal effects to
13 his wife and the agents told Mrs. Weiner where they were
14 taking the defendant and where he would be arraigned the
15 following day.

16 At that point the defendant asked his wife to
17 call a lawyer and to tell him what happened.

18 It is clear to me from this statement which
19 nobody has denied that the defendant was anxious to have
20 the services and advice of an attorney and the agents
21 were on notice that the defendant was so advised.

22 I don't believe that they could disregard this
23 statement as having no significance whatever, but, more
24 importantly, we have here a very serious conflict of
25 testimony concerning whether the defendant Weiner was at

THE COURT'S CHARGE TO THE JURY

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EOpa

The Charge-in-Chief

(Jury present.)

THE CLERK: The Court is about to charge the jury. Any spectator wishing to leave the courtroom will do so now or else remain seated until the completion of the Court's charge.

Will the marshal please see that the door is locked.

THE COURT: Ladies and gentlemen of the jury: Let me add my own thanks to the thanks that have already been paid you by the attorneys in the case. It has been very apparent that you have paid very close attention to the evidence as it was being presented and I am very grateful for that attention and for the conscientious manner in which you have followed the trial.

I want to thank the attorneys, too, who have been courteous and who have conscientiously represented their respective clients in the case.

If I make any references to the evidence in the case, please don't feel that I am trying to foist any conclusion upon you or that my recollection of the evidence is necessarily correct. It may be in error and you must rely upon your recollection to the exclusion of mine and to the exclusion of the attorneys.

The documentary evidence or the articles

1 EOpa

2 marked in evidence can be made available to you at any time.

3 I am going to give you a copy of the indictment when you retire

4 and a copy of the list of exhibits so that if you want to look

5 at anything or read the indictment, you are free to do that.

6 You don't have to look at any exhibits if you don't want to,

7 but they are there for your inspection if you want to look at them

8 Now, if you want to refresh your recollection
9 with respect to the precise testimony of any particular witness,

10 the only way that can be done is to have it read in open court,

11 but if you want it done, just make the request and you will be

12 accommodated.

13 As I have told you at the outset, I instruct you
14 that any questions I may have asked during the trial have no
15 special importance and no special magic. I asked them on the
16 spur of the moment solely because I thought the answers might
17 be of assistance to you.

18 Now, my questions deserve no more and no less
19 consideration than the questions put by counsel and you must not
20 be affected in any way in the exercise of your important,
21 exclusive fact-finding function by rulings of law which
22 I may have made.

23 I have a separate and distinct function from
24 yours and you should not let the discharge of my function
25 impinge in any way upon your exclusive fact-finding function.

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Remember that your judgment, your ultimate verdict should be based upon the evidence which consists of the testimony you heard from the witnesses. It consists of the exhibits which have been marked in evidence and of any stipulations or concessions made by counsel.

There have been a number of concessions and stipulations as we have gone along and as you have noticed and I want to thank counsel for those stipulations and concessions because they have saved time.

Now, since this is a criminal case the burden rests upon the government and never shifts to the defendant. It is the government which has the burden of proving the defendant guilty beyond a reasonable doubt and the defendant is presumed to be innocent throughout the trial and throughout your deliberations until such time, if that time ever comes, when proof of his guilt has been established beyond a reasonable doubt and when the presumption of innocence is overcome by such proof.

What do we mean by a reasonable doubt? Let me say parenthetically that a reasonable doubt may be based not only on the evidence, but on the lack of evidence in the case. The reasonable doubt is such a doubt as would cause a reasonable man to hesitate to act in more serious and important affairs in life. It is a doubt which a reasonable person has after

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carefully weighing all the evidence.

Reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience. Beyond a reasonable does not mean to a mathematical certainty or beyond all possible doubt.

Reasonable doubt is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Vague, speculative or imaginary qualms or misgivings are not reasonable doubts.

If, after a fair, impartial and careful consideration of all the evidence, you are convinced of the guilt of the defendant, you must convict him.

If, on the other hand, after such a fair, impartial and careful consideration of all the evidence, you doubt the defendant's guilt, you must acquit him.

Now, there are three charges in this indictment and I will read each charge separately and then I will explain the essential elements that you must find beyond a reasonable doubt in order to find the defendant guilty. If you have a reasonable doubt with respect to any one of these essential elements, it is your duty to acquit the defendant.

Now let me stress, as I believe I have already had occasion to say at the outset, that an indictment is merely

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2 a procedural device for bringing the case to trial and to
3 put the accused on notice of the charge which it is expected
4 to be proved.

5 The indictment is not evidence. It is not
6 proof. It is not an exhibit in the case. It is purely and
7 simply a procedural paper. It is an important piece of paper
8 because it is the reference to which we must refer for the
9 purpose of understanding the charge made against the defendant
10 and knowing what the essential elements are, but you must
11 be careful not to conclude and not permit yourself to be
12 brought into the frame of mind that because a man is accused
13 it constitutes some proof of his guilt. It does not constitute
14 any proof.

15 Now, this indictment has three counts, each count
16 is a separate charge and it will be your duty to render a
17 verdict of guilty or not guilty with respect to each one of
18 these three counts.

19 There are two defendants named. One is the
20 defendant Weiner, who has been on trial, the other is the
21 defendant Steve Silverman, who testified in this case as a
22 witness and who you know has already pleaded guilty to the
23 first count of this indictment and who is awaiting sentence
24 a week from today before another Judge of this Court.

25 You are not to be concerned with the guilt or
innocence of Mr. Silverman. He is not on trial before you.

1 Eopa

2 He is a witness and his credibility is very much in issue in
3 this case and I will have a good deal more to say about
4 Silverman at a later point in my charge.

5 At this point my only purpose is to emphasize
6 the fact that your sole responsibility is to determine whether
7 or not on these facts and subject to the law, as I am charging
8 you, the defendant Richard Weiner is guilty or not guilty on count
9 one, two and three of this indictment.

10 Now, the offenses charged in the indictment
11 concern the unlawful possession of hashish and marijuana in
12 October of 1974 with the intent to distribute it. Count one
13 of the indictment charges that the defendant, Richard Weiner,
14 together with other co-conspirators, combined and conspired to
15 distribute controlled substances in violation of the Federal
16 Narcotics Laws.

17 Count two charges that the defendants Richard
18 Weiner and Stephen Silverman possessed 40 pounds of a
19 controlled substance, namely, hashish, with the intent to
20 distribute it in violation of the Federal Narcotics Laws and
21 count three charges the defendant Richard Weiner with possession
22 of 198.1 grams of marijuana, which we are told is slightly less
23 than half a pound, with the intent to distribute it in violation
24 of the Federal Narcotics Laws.

25 Now, let me read the conspiracy count, count one.

1
2 and I will explain it in greater detail before reading the other
3 two counts. This count charges that by conspiring and agreeing
4 to distribute hashish the defendants violated Section 846 of
5 Title 21 of the United States Code. Title 846 makes it a
6 crime to conspire to violate 841 of Title 21, which is another
7 statute of the United States.

8 I will instruct you more fully later on in my
9 charge with respect to the precise meaning of Section 841, the
10 statute the defendants are charged with having conspired to
11 violate.

12 However, at this point I want to tell you in
13 broad and general terms that Section 841 makes it illegal to
14 distribute or possess with intent to distribute certain controlled
15 substances, including hashish, which is a form of a plant called
16 cannabis sativa or marijuana.

17 Count one reads as follows: From on or about the
18 28th day of October 1974 and continuously thereafter up to and
19 including the date of the filing of this indictment in the
20 Southern District of New York, Stephen Silverman and Richard
21 Weiner, the defendants, and others to the Grand Jury unknown,
22 unlawfully, intentionally and knowingly combined, conspired,
23 confederated and agreed together and with each other to
24 violate Sections 812, 841 A(1) and 841 B(1)B of Title 21
25 United States Code.

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2 It was part of said conspiracy that the said
3 defendants unlawfully, intentionally and knowingly would
4 distribute and possess with intent to distribute schedule one
5 controlled substances, the exact amount thereof being to the
6 Grand Jury unknown in violation of Sections 812, 841A(1) and
7 841B(1)B of Title 21, United States Code.

8 Then there is a list of overt acts preceded by
9 the allegations that in pursuance of said conspiracy and to
10 effect the objects thereof, the following overt acts were
11 committed in the Southern District of New York:

12 On or about the 30th day of October, 1974, the
13 defendant Steve Silverman and Richard Weiner left an apartment
14 building at 215 East 80th Street, New York, New York.

15 Two, on or about the 30th day of October 1974
16 the defendants Stephen and Richard went to the vicinity of
17 East 81st and 2nd Avenue, New York, New York.

18 Third, on or about the 30th day of October 1974
19 the defendants drove a Chevy Nova bearing New York registration
20 number 202 ZDG to the area of East 80th Street and 2nd Avenue.

21 Four, on or about the 30th day of October 1974
22 the defendants Stephen and Richard while in the vicinity of
23 East 81st Street and 2nd Avenue possessed approximately 40
24 pounds of hashish.

25 Then there is a reference to Section 846,

1 EOPA

2 Title 21 of the United States Code from which these charges
3 are phrased.

4 Now, what do we mean by a conspiracy? A
5 conspiracy comes from two Latin words, con and spirare meaning
6 respectively with and to breathe. Literally it means a
7 breathing together. It is sometimes called a collective
8 agreement or a partnership in crime and because it is a
9 partnership in crime, because more than one person is involved,
10 it presents a greater potential threat to the public than the lone
11 wrong doer and if two or more persons conspire or combine
12 together to commit or cause to be committed a breach of the
13 criminal laws of the United States, it is considered to be an
14 offense of grave character.

15 Concerted action for criminal purpose often if not
16 normally makes possible the attainment of ends more complex than
17 than those which an individual acting alone would accomplish.
18 Group association increases the likelihood that the criminal
19 object will be successfully realized and renders detection
20 more difficult than in the instance of the sole wrong-doer.
21 It was because of these and other reasons that Congress made
22 conspiracy or concerted action to violate the Federal
23 Narcotics Laws a crime entirely separate, distinct and
24 different from the substantive narcotic law which may be the
25 object of the conspiracy.

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A conspiracy may be defined as a combination of two or more persons to accomplish an unlawful purpose by concerted action. In this case to distribute or possess with intent to distribute a controlled substance or controlled substances.

A conspiracy to commit a crime is separate and distinct from the substantive crime that the conspiracy was formed to accomplish. Thus, in a conspiracy charge, there is no need to prove an actual violation of the substantive laws, that is that the defendant did distribute or did possess with intent to distribute any controlled substances.

If there was an agreement between the defendant and one or more persons to distribute or to possess with intent to distribute controlled substances and one or more acts were done to bring about the object of that agreement, the conspiracy statute is violated and, thus, if a conspiracy existed, even if it should fail in its purposes, it is still punishable as a crime.

To prove the charge of conspiracy against each defendant the government must prove beyond a reasonable doubt the following essential elements and if you have a reasonable doubt with respect to any one of these essential elements, it would be your duty to acquit the defendant:

The essential elements are as follows:

1
2 First: That sometime on or about the period
3 between October 28, 1974 and February 4, 1975 an agreement
4 existed between two mor more persons to distribute or possess
5 with intent to distribute controlled substances.

6 I don't know where this February date came in here
7 and I am sorry I mentioned it. Actually, the facts of this
8 case would indicate that if a conspiracy existed it existed
9 over a fairly short period of time and, as I will charge you
10 later, if you find that the conspiracy existed at any time
11 within the period that is mentioned here, the indictment says
12 continuously up to and including the filing of the indictment.
13 Well, this indictment was filed several months later and it
14 doesn't have to conform to that allegation at all. If it
15 happened during a segment of the period that is charged in
16 the indictment, that is a sufficient complaine with the
17 allegation and the proof is sufficient.

18 So that I will reread this first element leaving
19 out this February date, which got in here somehow; that
20 sometime on or about the period between October 28, 1974 and
21 a short time thereafter an agreement existed between two
22 or more persons to distribute or possess with intent to
23 distribute a controlled substance, that would be the first
24 element in the crime.

25 I think that the evidence in the case is largely

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2 restricted to the brief period of days between the 28th
3 and the 31st of October 1974.

4 The second element is that the defendant
5 knowingly associated himself with the conspiracy.

6 The third element is that at least one of
7 the conspirators committed one of the overt acts charged
8 in the indictment at or about the time and place alleged.

9 Thus, in essence the conspiracy charge against
10 the defendant is proven when a criminal agreement is proven
11 and it is shown that the defendant became a member of the
12 conspiracy with knowledge of its purposes and when it has
13 established that somebody performed at least one overt act
14 in furtherance of the conspiracy.

15 To establish that a conspiracy existed, the
16 government is not required to show that two or more persons,
17 such as the defendants named in the indictment, sat around
18 a table and entered into a solemn pact. . Indeed it
19 would be unusual if conspirators did any such thing.

20 These are not matters which are reduced to
21 any such formalities. Your common sense will tell you that
22 when people, in fact, undertake to enter into a criminal
23 conspiracy much is left to unexpressed understanding,
24 Conspirators do not usually reduce their agreements to
25 writing or acknowledge them before a notary public nor do they

1 EOpa
2 publicly broadcast their plans.

3 From its very nature a conspiracy to violate
4 the law is almost always characterized by secrecy rendering
5 detection difficult and, thus, it is sufficient if two or
6 more persons in any manner through any contrivance,
7 impliedly or tacitly, come to a common understanding to
8 violate the law. Express language or specific words are
9 not required to indicate assent or attachment to a
10 conspiracy.

11 In determining whether there has been an
12 unlawful agreement you judge acts and conduct of the
13 alleged co-conspirators which are to carry out an apparent
14 criminal purpose and in this instance the adage "Actions
15 speak louder than words" is applicable and, thus, to find
16 that a conspiracy existed you need only find that two or
17 more persons agreed together to accomplish an unlawful
18 purpose. Or to use unlawful means to accomplish a lawful
19 purpose.

20 And thus to find that a conspiracy existed
21 you need only find the element I have just explained.

22 You must further find that the conspiracy,
23 of course, had an illegal purpose. The indictment charges
24 that the unlawful purpose of the conspiracy in this case
25 was to distribute or to possess with an intent to distribute

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2 controlled substances and in this case in particular,
3 hashish.

4 As I have already told you and will instruct
5 you more fully later, it is not necessary for the government
6 to prove the success of the conspiracy. Success or failure
7 in the alleged undertaking to distribute or possess with
8 an intent to distribute controlled substances is not material
9 and is not an element of the offense.

10 The second necessary and essential
11 element has to do with the defendant's participation in
12 the conspiracy. If you do conclude that the conspiracy
13 charge did exist, you must next ask yourself whether the
14 defendant participated in it. To find that a defendant
15 participated in the conspiracy you must upon all the evidence
16 be satisfied beyond a reasonable doubt that aware of its
17 purpose, he was a willing participant with the intent to
18 advance its purpose and that he joined the conspiracy
19 with a specific criminal intent and that is with a
20 deliberate purpose to violate the law.

21 In determining whether the defendant became
22 a member of the conspiracy, you must determine not only
23 whether he participated in it, but whether he did so with
24 knowledge of its unlawful purposes.

25 Knowledge is a matter of inference from the

1 facts proved. He must have joined with an awareness of
2 at least some of the basic aims and purposes of the
3 conspiracy. To have guilty knowledge the defendant need
4 not know the full extent of the conspiracy and all of its
5 activities. In fact, each member may perform separate and
6 distinct acts at different times and different places, but
7 I want to caution you that mere association with a wrongdoer
8 does not make one a member of the conspiracy nor is
9 knowledge without participation sufficient. What is necessary
10 is that the defendant participate with knowledge of at
11 least some of the purposes of the conspiracy and with
12 intent to aid in the accomplishment of these unlawful ends.
13

14 Let me digress for a moment to give you
15 one or two examples which would indicate better what I
16 intend to express. Let's suppose a trafficker in drugs
17 intending to perform an illegal transaction arrives at an
18 airport and takes a taxicab and let's assume that he is
19 carrying some drugs which because of their smell or for
20 other reason are recognized by the taxi driver as
21 probably being drugs and let's suppose the taxi driver takes
22 a good look at him and thinks he recognizes him as somebody
23 whom he believes is engaged in this traffic.

24 Now, he is associating with him. In fact,
25 he is driving him into the city at his direction. He is

1 performing something that the drug trafficker is asking
2 him to do and the taxi driver is reasonably aware of
3 what the other man is doing. Is he a co-conspirator?
4 He is not because he is not participating in the other
5 man's illegal activities even though he is associated with
6 him in a sense and even though he is aware in a sense of
7 what he is doing.
8

9 Or take another case. Take the wife of a
10 drug trafficker who suspects that her husband is in this
11 business and who berates him for it and does everything
12 she can to keep him from engaging it, does everything
13 short of reporting him to the narcotic agents and saying
14 "I suspect my husband is in this business and I don't want
15 him in this business." Is she a co-conspirator? She is
16 not, even though she is aware or reasonably aware, even
17 though she is associated with him, but not in the illegal
18 business.

19 So you have to make this very careful distinction
20 between presence without association, help without participation
21 mere association, mere knowledge without participation are
22 insufficient.

23 If you find that the defendant participated
24 in the conspiracy, then however limited his role in furthering
25 the objective of the conspiracy, he is responsible for all

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2 that was done in furtherance thereof before and during
3 its continuance.

4 Once you are satisfied beyond a reasonable
5 doubt that a conspiracy existed and that the defendant was
6 a member, then the acts and declarations of any other
7 persons whom you also find was a member of the conspiracy
8 made by such co-conspirators during its existence and in
9 furtherance of its objectives are considered the acts and
10 declarations of the defendant so found to be a member even
11 though he was not present.

12 I will say more about that in a moment.

13 That idea is based upon the principle of agency and that
14 is why you were allowed in this case to hear evidence of
15 what happened outside the presence of Weiner because if
16 you find that the conspiracy existed and if you find that
17 the defendant participated in it, then the acts of one
18 conspirator are binding and the acts and declarations of
19 one conspirator are binding upon the other on the principle
20 of agency that each one is helping the other and working
21 for the other.

22 Now, the third essential element has to do
23 with the overt acts which I have already read to you.
24 This element is that an overt act must be proven beyond a
25 reasonable doubt and an overt act is one intended to effect

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2 the object of the conspiracy and it must be committed
3 by at least one of the co-conspirators after the unlawful
4 agreement has been made.

5 An overt act is any step, action or conduct
6 which is taken to achieve, accomplish or further the
7 objective of the conspiracy. The purpose of requiring
8 proof of an overt act is that while parties might conspire
9 and agree to violate the law, yet they may change their
10 minds and do nothing to carry out the agreement in which
11 event it would not constitute an offense.

12 The overt act need not be the very crime
13 which is the object of the conspiracy nor need it even be
14 a criminal act.

15 As you noticed, most of these acts which
16 I read were not in and of themselves illegal. In fact,
17 the only one that is in and of itself a charge of
18 illegality is the possession of the 40 pounds of hashish,
19 which is overt act four. The other three are not in
20 themselves illegal acts, but they need not be because
21 an overt act is any step, action or conduct which is taken
22 to achieve the objective of the conspiracy.

23 The act may be innocent on its face, but
24 if it is of such a character that it furthers or promotes
25 or aids and assists in the accomplishment of the purposes

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2 of the conspiracy or one of its purposes it is nevertheless
3 an overt act.

4 It is not necessary for the government to
5 prove that each member of the conspiracy committed or
6 participated in an overt act or even that the defendant
7 Richard Weiner committed one. The act of any member done
8 in furtherance of the conspiracy becomes the act of all the
9 other members and, thus, it is sufficient if you find that
10 any co-conspirator committed an overt act.

11 Also, the government is not required to
12 prove each of the overt acts alleged in the indictment, although
13 the contention has been that it has. It is sufficient if
14 it proves the commission of at least one of the overt acts
15 in the Southern District of New York, which includes
16 Manhattan and the area in which these acts allegedly occurred.

17 An overt act need not have occurred at the
18 precise time and place mentioned in the indictment. It is
19 sufficient if it occurred at or about that time.

20 Now, let me refer again to the liability of one
21 co-conspirator for the acts and statements of another
22 co-conspirator. If you find that a defendant participated
23 in the conspiracy, then however limited you find his own
24 role in furthering the objectives of the conspiracy, he is
25 responsible for all that was done in furtherance thereof
during its continuance. Once you are satisfied beyond a

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2 reasonable doubt that a conspiracy existed and that the
3 defendant was a member, then the acts and declarations of
4 any other person whom you also find was a member of the
5 conspiracy made by such co-conspirator during the conspiracy's
6 existence and in furtherance of its objectives are considered
7 the acts and declarations of the defendant even though he was
8 not present.

9 You will recall the evidence with respect to
10 Stephen Silverman in the car of O'Connor where he was observed
11 to have counted money and according to his own testimony he
12 was wadding his thumb while he was counting \$26,000 of one
13 hundred dollar bills and you also had some conversation, according
14 to his testimony and that of Agent O'Connor who was acting
15 in an undercover capacity, about making one delivery for one
16 payment or two deliveries for two payments and so forth. All
17 of this happened outside the sight and hearing of Weiner, but
18 if you find that there was a conspiratorial agreement between
19 Weiner and Silverman and that what Silverman was doing was
20 in furtherance of this conspiratorial agreement, then you can
21 see how that takes you a long way down the road of reaching a
22 conclusion with respect to the charge contained in the first
23 count. A conspiracy once formed is presumed to have
24 continued until its objectives are accomplished or there is an
25 affirmative act of termination by its members. So, too, once

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2 a person is found to be a member of a conspiracy, he is
3 presumed to continue his membership until its termination unless
4 there is affirmative proof offered of withdrawal or disassociation
5 Here you can find that this conspiracy ended when they were both
6 arrested on 2nd Avenue near 80th Street because nothing that
7 happened after that time, and I can't recall what evidence there
8 is at this moment with respect to that, but the conspirators did
9 not after that point undertake any actions which could have
10 furthered the conspiracy, so that the conspiracy if it existed
11 ended with their arrest on the evening of October 20th.

12 Now, you received testimony in this case
13 concerning the prior acts of Silverman and Weiner, according to
14 the testimony of Stephen Silverman. You remember that
15 Stephen Silverman was allowed to testify over objection
16 that he had talked to Weiner shortly before the transactions
17 which are the subject of this indictment about the availability
18 of a large amount of hashish and that Weiner had told him that
19 he wouldn't sell less than 15 pounds and there was an exhibition
20 of a wheel of hashish which he described as ten inches in
21 diameter, two inches thick and weighing two pounds and that
22 it looked like one of the wheels that was offered in evidence
23 in this case; that Silverman had been in the apartment when
24 there were deliveries of hashish to the apartment and on one
25 occasion he made a pick-up where he delivered \$800 to Weiner and

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2 that Weiner weighed and wrapped the hashish and gave it to him
3 and then he gave it to a customer who was waiting downstairs
4 and that on one occasion he smoked the hashish as a sample in
5 order to try it.

6 Well, that evidence, none of it was relevant
7 to the charge of this case. The administration of our
8 system of criminal justice and our basic concepts of fair
9 dealing are centered on the requirement that in each case the
10 jury reach a result based solely on the charges made in the
11 particular indictment and on the evidence which appears in the
12 record with regard to those charges.

13 So you might well say, "Well, now, why did we
14 have to hear all that evidence about something that
15 is never referred to in this indictment?"

16 The reason is that while that testimony cannot
17 be accepted as proof of the charges in this indictment, it
18 was received and you may consider it for the limited purpose
19 of permitting the prosecution to show the defendant's
20 motive, the defendant's intent, the defendant's inclination,
21 the defendant's purpose and associations.

22 Evidence that an act was done at one time or on
23 one occasion is not any proof whatever that a similar act was
24 done at another time or on another occasion. That is to
25 say that evidence that the defendant may have committed an

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2 earlier act of a like nature may not be considered in
3 determining whether Weiner committed any offense charged in
4 the indictment, nor may evidence of alleged earlier acts of a
5 like nature be considered for any other purpose unless you
6 first find that the other evidence in the case, standing
7 alone, establishes beyond a reasonable doubt that the accused
8 did the particular acts charged in the particular count of
9 the indictment under deliberation.

10 You may consider the evidence of these
11 alleged earlier acts of a like nature in determining the
12 state of mind or intent with which the accused Weiner did
13 the acts charged in the particular count of the indictment.
14 Where proof of an alleged earlier act of a like nature is
15 established by evidence which is clear and conclusive, you may
16 draw therefrom the evidence that in doing the acts charged
17 in the count in the indictment under consideration the
18 accused acted willfully and with specific intent to violate
19 the narcotic laws and not through mistake or inadvertency or
20 innocent reasons.

21 I wish to caution you again that proof of the
22 prior activity does not prove the offense or offenses charged
23 in this indictment, but may be considered by you solely on the
24 question of intent, which is one element of the crime
25 charged here. It will be up to you and you alone to determine

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2 whether you believe Silverman's testimony and, if so, the
3 weight that you will give it on this question of intent.

4 Let me draw this dictinction even a little
5 more finely for you.

6 Suppose at the end of all your consideration of
7 the evidence, and you must consider all of the evidence,
8 you must consider all the arguments of all counsel in the
9 case, and suppose you come to the conclusion that all the
10 prior acts have been proven beyond a reasonable doubt, beyond
11 any question, but that none of the acts alleged in the in-
12 dictment has been proven, it would be your duty to acquit
13 the defendant. He cannot be found guilty under this indict-
14 ment because you are convinced of the truth of what occurred
15 prior to the acts which are charged in this indictment.

16 Now, let me turn to count two. Count two is
17 what I have referred to before as the substantive offense
18 and it reads as follows, it is very short:

19 "On or about the 30th day of October 1974 in
20 the Southern District of New York, Stephen Silverman and
21 Richard Weiner, the defendants, unlawfully, intentionally
22 and knowingly did possess with intent to distribute," re-
23 member those words, possess with intent to distribute," a
24 schedule one controlled substance, to wit, approximately 40
25 pounds of hashish."

Then there is a reference to the laws from which

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2 these allegations were drawn.

3 This count charges a violation of the Federal
4 Narcotics Laws, specifically Title 21 of United States Code
5 Section 841, which makes it a crime to possess with intent
6 to distribute a controlled substance, in this count
7 hashish. The only defendant on trial before you who is
8 charged in count two is the defendant Richard Weiner. You
9 are not concerned with the guilt or innocence of Stephen
10 Silverman so far as your responsibility for the returning of
11 a verdict is concerned.

12 Before you can find Weiner guilty of the
13 crime charged in count two of the indictment, you must be
14 convinced beyond a reasonable doubt that the government
15 has proved the following elements:

16 First: That on or about the dates set forth
17 in the indictment, that is October 30, 1974, Richard
18 Weiner possessed with intent to distribute a controlled substance

19 Second: That he did so unlawfully, willfully
20 and knowingly.

21 And third: That the substance which the
22 defendant possessed was in fact a controlled substance.

23 You will note that the first element of the
24 offense, possession with intent to distribute the substance,
25 means that the word "distribute" and the words "Actual,

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2 constructive" or "Attempted transfer of drugs" are implicit
3 in the word "distribute". The word "possess" has its
4 common, everyday meaning and that is something within
5 your control and to have something within your control does not
6 necessarily mean that you have it in your hand or your pocket.

7 Control may be demonstrated by the existence of
8 a working relationship between the person having such control
9 and the person with actual physical custody. The word
10 "intent" refers to a person's state of mind so that the
11 term "Possess with intent to distribute" can be fairly stated
12 to mean to control an item with the state of mind or
13 purpose to transfer that item.

14 Possession may be of two kinds. It may be
15 actual or physical possession of a substance where the
16 substance is in actual custody of the person or it may mean
17 dominion or control of the drugs such that the defendant
18 could move them himself or cause others to move them as his
19 agents. That is what we call constructive possession.

20 It is not necessary for the government to
21 prove that the defendant had actual physical possession of the
22 40 pounds of hashish charged in count two. Proof of constructive
23 possession is sufficient.

24 In this case the evidence would justify you
25 in concluding that the Chevrolet Nova car rented by Weiner and

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2 the keys of which he allegedly gave to Silverman put Weiner
3 in a position where he was in custody and control of these
4 drugs, but transferred custody and control temporarily to
5 Silverman for the purpose of effecting transfer or sale for
6 \$26,000.

7 If you come to the conclusion that that is what
8 occurred, you will have sufficiently determined that the
9 defendant Weiner had dominion and control over these drugs
10 with intent to distribute them.

11 Now, the actual possession at the time of the
12 arrest was in the hands of Weiner and I will have more to say
13 about aiding and abetting in a moment.

14 As to the second element, the terms "unlawfully,
15 willfully and knowingly" mean that you must be satisfied beyond
16 a reasonable doubt that the defendant knew what he
17 was doing and that he did it deliberately and voluntarily as
18 opposed to mistakingly or accidentally or as a result of some
19 coercion. That means that he knew he was dealing in
20 hashish and that he intended to deal in hashish at this time
21 and place.

22 As to the third element, the indictment charges
23 that the controlled substance involved in count two is hashish.
24 I instruct you as a matter of law that hashish is a controlled
25 substance being a form of cannabis sativa L or marijuana.

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2 The government chemist has testified that the substance he
3 tested was a grade of hashish and there doesn't seem to be
4 much of a contest about that.

5 In other words, the law requires you to find
6 beyond a reasonable doubt that it was hashish, but I
7 respectfully suggest, ladies and gentlemen, that you should
8 have very little difficulty reaching the conclusion beyond
9 a reasonable doubt that that is precisely what it was.

10 Now, I mentioned aiding and abetting a moment
11 ago and I might add that in order for you to find the
12 defendant Richard Weiner guilty under count two it is
13 not necessary for you to find that he committed each of the
14 acts alleged in that count. The law provides that one who
15 knowingly aids or abetts another in any way in the commission
16 of a crime is equally guilty with the principal in the
17 commission of that crime and is himself a principal and may
18 be charged with the commission of the crime as a principal
19 and convicted upon such a charge.

20 One who shares another's criminal purpose and
21 encourages another to carry out such a purpose is an aider and
22 abettor who is punishable under the law as a principal.

23 There is no precise rule as to what acts a defendant
24 must perform in order to constitute himself an aider and
25 abettor. It is enough if a defendant in some manner associated

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2 himself with the illegal venture, participated in it assuming
3 that he wished to bring about or that he sought by his
4 acts to make it succeed. Even a small degree of concert or
5 collusion is sufficient. The assistance given need not con-
6 tribute to the criminal result so significantly that in the
7 sense but for such assistance the result would not have
8 occurred. The standard is not that rigid. It is sufficient
9 if the assistance facilitates or encourages the result that
10 would have taken place without such assistance.

11 Accordingly, you may find the defendant guilty
12 of the offense charged in court two if you find beyond a
13 reasonable doubt that Stephen Silverman committed the offense
14 with which he is charged in that count and that Weiner aided
15 and abetted Silverman. To determine whether Weiner aided and
16 abetted Silverman. To determine whether Weiner aided and
17 abetted the commission of the offense charged in count two,
18 it as something he wished to bring about. Did he actually
19 associate himself with the venture? Did he seek by his acts
20 to make it succeed?

21 Mere presence and guilty knowledge are not
22 enough. You must be convinced beyond a reasonable doubt that
23 he did something to forward the crime and that he was a
24 participant and not merely an unknowing spectator and that
25 he commanded or requested or encouraged or provoked or aided

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2 Silverman in planning or committing the crime.

3 It is essential that he knew of the
4 criminal purpose and intended by his participation to aid
5 in its accomplishment.

6 If you have a reasonable doubt with respect to
7 any of these elements that are essential to the commission of
8 this offense you should then acquit the defendant Weiner.

9 I now turn to count three, which is also a short
10 count and could be referred to as the marijuana count. The
11 first two counts, ladies and gentlemen, refer to the
12 alleged activities of Stephen Silverman and Richard Weiner and
13 to the hashish, the 40 pounds of hashish.

14 The third count refers to Richard Weiner alone
15 and has to do with the marijuana that was seized in his
16 apartment at 215 East 80th Street.

17 It reads as follows:

18 "On or about the 30th day of October 1974 in the
19 Southern District of New York, Richard Weiner, the
20 defendant, unlawfully, intentionally and knowingly did possess
21 with intent to distribute a schedule one controlled substance,
22 to wit, approximately 198.1 grams of marijuana.

23 This count also charges a violation of Title 21
24 United States Code, Section 841, which makes it a crime to
25 possess with intent to distribute a controlled substance and

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2 in this count marijuana. Only the defendant Weiner is
3 charged in this count and before you can find him guilty of
4 the crime charged in this count you must be convinced
5 beyond a reasonable doubt of the following elements:

6 First: That on or about the date set forth
7 in the indictment, that is October 30, 1974, Richard Weiner
8 possessed with intent to distribute a controlled substance.

9 Second: That he did so unlawfully, willfully
10 and knowingly.

11 And third: That the substance which the
12 defendant Weiner possessed was in fact a controlled substance.

13 Now, you will note that count three charges a
14 entirely different crime from that charged in count two and
15 you must consider it separately, but both charge violations
16 of the same federal law which proscribes possession of a
17 controlled substance with intent to distribute it.

18 Thus, as I have just read them to you, the
19 elements of the offense charged in count three are essentially
20 those I explained to you with respect to count two and the
21 same definitions apply.

22 However, you will note that the controlled
23 substance charged in count three is alleged to be marijuana
24 and I instruct you as a matter of law that marijuana is a
25 controlled substance, but again you must find this element

1 as well as the other two elements beyond a reasonable doubt
2 before he can be found guilty.

3 If you have a reasonable doubt with respect to
4 any one of these you should acquit the defendant.

5 Now, there is a word of caution about count
6 three because it makes really two charges that you have
7 to consider and not just one and it is what we call a lesser
8 included charge. You see, under Federal Law, if you possess
9 with intent to distribute, that is the more serious offense,
10 but if you possess without an intent to distribute, that
11 is a misdemeanor, it is a less serious offense.

12 In order to convict the defendant of count three,
13 possession of marijuana with intent to distribute, you must
14 find that the prosecution has proven beyond a reasonable
15 doubt not only that the agents found the marijuana in the
16 defendant's apartment, but that this marijuana was the
17 exclusive property of the defendant and not the property
18 of anybody else and that this marijuana was not for use, but
19 was for distribution.

20 Now, if you find that the prosecution has
21 proved beyond a reasonable doubt only the first two of these
22 facts, that is, that the agents found the marijuana in the
23 defendant's apartment and that the marijuana belonged exclusively
24 to the defendant and to no one else, you may not find the
25

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2 defendant guilty on count three as it is presently drawn,
3 but you may find him guilty of the lesser included charge of
4 possession, possession alone, that is without intent to
5 distribute marijuana.

6 You must consider these two possible charges.
7 Possession with intent to distribute, on the one hand, and
8 possession alone, on the other hand.

9 In essence, this count contains two charges.
10 The more serious charge is the one contained in the
11 third element, the intent to distribute. The less serious
12 charge, the misdemeanor charge is the one that excludes
13 this element. It is, therefore, within your power to acquit
14 the defendant on this count altogether or to find him guilty
15 on this count as charged or to find him guilty on the lesser
16 included charge.

17 Now, in the last contingency, if you should find
18 him guilty of the lesser included charge, please indicate
19 that as part of your verdict by saying that the defendant is
20 found guilty, if that is the case, of possession only.

21 You see, you do one of three things. You can
22 acquit, you can find him guilty as charged or you can find
23 him guilty of possession only. If it is the last that you
24 do, please indicate that by saying that you find him guilty
25 of possession only.

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Proof of knowledge and intent exist in the mind and since it is not possible to look into a man's mind to see what went on the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is not necessary. Knowledge and intent may be inferred from all the surrounding circumstances. You must try to reconstruct the facts as they occurred. Try to place yourselves at that time and place in the factual context in which these alleged acts occurred and then from them try to determine what the intent of the persons who participated therein actually was.

Now, the fact that Silverman pleaded guilty to this count one, the conspiracy count, is not evidence of the guilt of the defendant Weiner and it is not evidence that the crimes charged here were actually committed. You have got to look at the proof in this case and you have got to consider that proof under the charge that I have given.

You are to determine whether or not the defendant Richard Weiner on trial here was guilty or not guilty solely with reference to the evidence adduced at this trial against

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2 him.

3 You have heard a number of witnesses in this
4 case. Stephen Moran, the special agent who -- I have here
5 the buyer -- was Moran the alleged buyer or O'Connor?

6 MISS HARRIS: Moran was the alleged buyer.

7 THE COURT: Special Agent Moran -- who was the
8 one they made the make-believe arrest of?

9 MISS HARRIS: That would be Agent Moran.

10 THE COURT: There is nothing wrong, ladies
11 and gentlemen, in an agent of the government posing as a
12 buyer of narcotics. As I told you at the outset of the case,
13 you have got to use your common sense and good judgment to
14 appraise what happened. That is the gift that you bring
15 to the courthouse in order to determine just what happened
16 and where the truth lies.

17 It must be apparent to you that if a narcotic
18 agent proceeded into an area where he thought he could
19 buy narcotics wearing a neon sign saying, "I am from the
20 Bureau of Drug Enforcement," he is never going to find a
21 seller.

22 Guile and strategem are necessary. Sometimes
23 lies are necessary for the purpose of cultivating the
24 idea in the prospective seller that this buyer is on the level.

25 Now, Stephen Moran had that role and, as a matter

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2 of fact, that role was even pushed to the extent of making
3 believe that they arrested him at the time of the arrest
4 because at the time, as the agent I believe it was Powers
5 who testified to it, they didn't want to reveal his true identity
6 at the time and then there was a crowd that started to form
7 so Stephen Moran was made to look like he was under arrest,
8 too, and that is the time they arrested Silverman and
9 Weiner near 80th Street and 2nd Avenue.

10 Now, you heard his story, you heard him tell
11 about his conversations with Silverman and what happened
12 in the car and the display of money and so forth. You heard
13 from the narcotic agent, the supervising agent, Michael Powers.
14 You heard from Michael O'Connor who did a good deal of the
15 watching.

16 You remember he said at one point that he saw
17 Silverman bending down in Moran's car and licking his
18 thumb. Well, you could infer from that, that is circumstantial
19 evidence, which I will define in a moment, you can infer
20 from that that what Silverman was doing was counting some
21 money. At any rate, Moran told you of that conversation
22 and Silverman told you about that conversation and you have
23 O'Connor who did a good deal of the watching in the case and
24 whose testimony would tend to corroborate what one or the
25 other said.

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2 You also heard from Fonseca, the chemist, and
3 you heard from Stephen Silverman, about whom I will have
4 more to say later. You heard from Daniel Weinert of the
5 Korvette's Rent-A-Car Agency concerning the rental contract
6 for the Chevrolet Nova car in which the hashish was seized,
7 the hashish that is referred to in the first two counts and
8 that rental arrangement or contract has been marked as an
9 exhibit in evidence and you can look at it if you want.

10 The defendant called Ronald Goldstein, the
11 co-owner of his restaurant business and Julio Arroyo, the
12 doorman at 215 East 80th Street where the defendant lives
13 and Agent Greenan was also called by the defendant.

14 Now, as to each and every one of these
15 witnesses, it will be up to you and you alone to judge their
16 credibility, to decide where the truth lies and to decide
17 what importance or probative value to attribute to that truth
18 as you find it.

19 You can see what a stupendous responsibility
20 the law places upon you. You should judge the inherent
21 probability of what the witness said. You should judge the
22 demeanor of the witness while on the witness stand. The
23 force and effect of any contradictory statements, if you
24 think they were made. The interest of the witness in testifying
25 as he did and, remember, that it is the quality, not the

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quantity, of the evidence that counts. It is you and you alone who will place the proper tag of quality on any of the proof in the case.

Now, if you think that any witness has engaged in the willful falsehood while testifying before you, you can do one of two things. You can either reject all of the testimony on the ground that all of it is so tainted by falsehood that none of it is worthy of belief or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.

It is like a person eating a fruit which appears to be sound and wholesome and suddenly discovering some imperfections. Some person will cut out the imperfections and eat the rest of the fruit. Others will reject the whole fruit and largely for the same reasons, largely generally because of the extent to which the imperfection may have affected the rest of the fruit.

That is pretty much what the law says you can do with a lying witness and the charge here has been made against practically all of the government witnesses, except the chemist, and particularly, but not exclusively against Stephen Silverman.

Now, all of these witnesses are euphemistically naked before you. Nobody comes into a court with any badge of

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2 of preferment or any mark of impairment. A man with a
3 criminal record and without an education can tell the truth.
4 A man with a college degree and who is perfectly articulate
5 and speaks with an Oxonian accent can be a liar. That
6 is why you, ladies and gentlemen, have been asked to make
7 the sacrifice to sit as jurors in this case. This case is
8 important to the defendant. It is important to the
9 government and it is important that your verdict be consonant
10 with the truth as you find it.

11 In determining whom you will believe and
12 what weight you will give to the testimony of the witnesses,
13 consider the nature of the evidence given by them, their bias
14 or prejudice, if any, as has been disclosed, their opportunity
15 to know and remember the facts about which they testify, their
16 manner and deportment while on the stand, their candor or
17 frankness or lack of it, their interest, if any, in the
18 result of the trial and the extent to which they are corroborated
19 or contradicted by other proof.

20 The probabilities as indicated by your common
21 sense and sound judgment that the things asserted in their
22 testimony actually existed or occurred. And such other
23 facts appearing in the evidence as will in your opinion aid
24 you in determining the extent to which testimony is worthy
25 of belief.

1 You should ask yourself as to each witness
2
3 what interest or motive that witness may have had to testify
4 in a particular manner. If you determine that any witness
5 has a motive or interest which might lead him to testify
6 falsely, ask yourself: Has he done so or has he told the
7 truth notwithstanding any motive or interest he might have?
8 Even if you do not doubt the good faith of a witness, you
9 should look out for circumstances which might lead to inaccurate
10 testimony, such as faulty memory or inadequate perception.

11 Throughout this process you will be using your
12 common sense and your understanding to assign to the
13 testimony of each witness the value and weight which best
14 appeals to your sound judgment.

15 You know, justice is sometimes portrayed as a
16 handsome lady in flowing robes holding a scale with two
17 plates. She is blindfolded and you might ask yourselves
18 well now, why should justice be blindfolded, because we
19 know that you need good eyes and good ears to do justice.
20 You can't be blindfolded in a courtroom. Quite the contrary.

21 But the reason, the artist's reason for blindfolding
22 that statue of justice was to portray the idea that everybody
23 is equal before the law. That sense of justice is the justice
24 that knows no color, no race, no religion, no wealth, no
25 poverty, every person that comes before that Court is treated

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2 precisely the same way and every witness should be judged
3 by the same standards. Nobody can come into the Court, as
4 we understand them and as we like to believe that they
5 operate, with any kind of preferment or with any kind of
6 apriori impairment.

It is up to you as the
7 exclusive judges of the facts to determine where the truth
8 lies, whom to believe and then what significance to attach
9 to that truth as you find it.

10 Now, much of the evidence in this case has
11 been circumstantial. There are bits and pieces of evidence
12 that have been given to you about what happened at particular
13 times. Where was the hashish at this time and at another
14 time? What was Silverman doing? What was Weiner doing?
15 Where did they move from and so forth.

16 Each bit and piece of evidence by itself
17 perhaps would not permit you to come to any firm conclusion,
18 but as you put them together you might be able to deduce
19 that other facts also exist.

20 That is what circumstantial evidence is. It
21 is evidence presented to you whenever you are supplied with
22 facts from which you are asked to deduce that other facts
23 also exist and you are permitted to resolve disputed questions
24 of fact on the basis of direct evidence, circumstantial
25 evidence or both.

1 The testimony of a witness based upon knowledge
2
3 acquired as a result of actual and personal observations
4 is direct evidence of what the witness observed. Evidence
5 of facts which allow you based upon your common experiences
6 to deduce or conclude that other facts or evidence occurred
7 is termed circumstantial evidence and circumstantial evidence
8 is proper and competent proof. Circumstantial evidence
9 appeals to the common sense and common experiences of mankind.
10 These teach us that the non-existence of some facts necessarily
11 implies that other facts connected with them exist.

12 Sometimes circumstantial evidence is even more
13 convincing than direct evidence because direct evidence may
14 depend upon the memory or observation or truth of one
15 witness while circumstantial evidence may be based upon the
16 memory, observation and truth of many witnesses who
17 concur and agree or upon physical facts which cannot be
18 mistaken and cannot speak falsely.

19 The Chevy Nova car was rented by the defendant
20 Weiner earlier that day. That fact has not been seriously
21 disputed in this case and the rental contract is in evidence
22 and you can consider it. What does that fact mean? It has
23 been argued to you in two ways by the counsel in this
24 case.

25 You have to consider it. What does it mean?

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2 because according to what it means, according to the
3 interpretation that you place upon it, one way or the other,
4 it will take you some distance down the road in this case
5 either toward a conviction or toward an acquittal.

6 Now, Stephen Silverman as called by the government
7 has told you that he and the defendant Weiner concurred in
8 the commission of the offenses charged in counts one and
9 two of the indictment. In asserting that he and the
10 defendant were confederates in these crimes, ne has
11 acknowledged himself to be in legal terminology an accomplice
12 and in fact he has pleaded guilty to count one, the conspiracy
13 count, and is expected to be sentenced next week.

14 You should scrutinize his testimony carefully
15 remembering that the function of determining his credibility
16 lies entirely with you. In performing this important function
17 it may assist you to bear in mind these considerations:

18 One: The fact that a person has confessed
19 his commission of a crime does not render him unable to
20 tell the truth or to recount with accuracy the events
21 which occurred.

22 Two: Indeed, if you are certain in your own minds
23 that he is telling the truth a conviction on the basis of his
24 testimony alone would be entirely proper.

25 Three: However, it is sometimes true that

1 a confederate who acknowledges his share in crime may hope
2 to escape a harsh sentence by assisting the government in
3 procuring the conviction of another. In this connection
4 you should remember that he has acknowledged his guilt, but
5 that the sentence has not yet been imposed upon him and he
6 has said that he expects and hopes to go free; that he will
7 not be prosecuted for any federal offenses that he has committed,
8 but he expects to be prosecuted for an open Jersey offense
9 which has not been terminated and possibly, he said, in
10 answer to a question put to him on cross examination,
11 possibly, he said, even for New York State offenses because
12 he is not at all sure that the promise to save him from
13 federal prosecution is going to save him from New York
14 State law prosecutions.

16 In sum you should ask yourselves whether or
17 not under all the circumstances put before you you feel
18 certain that Stephen Silverman spoke the truth so that you
19 may safely act on the testimony which he has given. He has
20 been attacked by the defense as somebody unworthy of telling
21 the truth, as somebody who has a gun at his head, as somebody
22 whose testimony is so outrageous that it is an insult to your
23 intelligence and the charge has been further made that
24 agents have lied in this case; that they have him in the
25 palms of their hands and they have squeezed him as they wish.

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2 and that Powers is a fraud and O'Connor a liar.

3 Ladies and gentlemen, those are very serious
4 charges and they are not to be taken lightly. If you can
5 come to the conclusion that Weiner has been framed by
6 Silverman with the assistance of these agents and that these
7 agents have lied and used Silverman as an instrument of their
8 fraudulent and perjurious conduct in this case, then
9 we have engaged in a monstrous charade and you should have no
10 hesitancy in acquitting the defendant.

11 On the third count, the count having to do
12 with the marijuana found allegedly in Weiner's apartment,
13 if you disbelieve all of Silverman's testimony in this
14 case, you will have to acquit the defendant Weiner on that
15 count because the only evidence that would permit you to
16 conclude that Weiner had possession of that marijuana or
17 that he had possession of it with intent to sell it is Silverman's
18 evidence because nobody in this case knows what happened
19 inside of that apartment, so far as this evidence is concerned,
20 except Silverman. Silverman has testified to his dealing
21 with Weiner right up to the time he says he got the key
22 to the car and met the so-called buyer, who turned out to
23 be a drug agent.

24 Now, if you reject Silverman, if you throw
25 Silverman out of this case and say, "I don't believe a word

1 Eopa

2 he says," which is what the defense has asked you to do,
3 then you must acquit Weiner on the third count because the
4 testimony of the agents and the circumstantial evidence in
5 the case given by them would not affect the third count in
6 any way. It does run to the first and second counts.

7 Now, on the first and second counts you can
8 reject Silverman and you can find on the basis of the
9 testimony of the agents, if you believe all of it, that the
10 defendant Weiner did commit those crimes, but the law
11 doesn't ask you to accept all or nothing. The law gives you
12 the power to pick any part of this evidence which you think
13 is true and to reject any part of it which you think is
14 untrue. That goes for all the evidence in the case,
15 testimonial and documentary evidence in the case.

16 It is up to you to cull the truth out where
17 you find it and then come to the conclusion that you think
18 is just and proper under the standards that I have charged
19 you. That again gives you some measure of your tremendous
20 power and responsibility in the case.

21 Now, the defendant Weiner did not take the
22 stand and testify in his own behalf and I instruct you that
23 you are to draw no adverse inferences from this. Our
24 constitution guarantees to a defendant the right to remain
25 silent throughout the trial and you are not to let the exercise

1 Ropa

2 of this right influence you in the determination of his
3 guilt or innocence. You should not speculate as to the reasons
4 for a defendant's failure to testify nor should you permit
5 this matter to enter into your appraisal of the evidence
6 in any way.

7 One word about Silverman which I would like
8 respectfully to suggest. He has been attacked on the
9 ground that he is a psychotic, mentally ill and he only
10 recently got out of a mental hospital and so forth. Well,
11 now, please don't speculate medical evidence into this case.

12 You have Silverman's testimony as to just what
13 his experience and exposure was with respect to this confinement
14 to the Jersey hospital. He testified in great detail
15 concerning what he knew and what he didn't know.

16 He also told you that he was under relaxation
17 or heavy sedation during a good part of his stay in the
18 hospital and that when he was released the doctor made no
19 specific recommendations, although he admitted he has been
20 a drug user in the past, he says he hasn't used drugs
21 recently and that he is not under any present instructions
22 to report back to the doctor, nor is he taking any
23 medications, except perhaps for sleeping, because he is an
24 insomniac.

25 Now, ladies and gentlemen, you have this man

1 HOpa

2 before you and it is up to you to judge his testimony
3 under the standards that I have expressed to you. I don't
4 know how you are going to come out with respect to his
5 testimony and, as I say, I did not wish to make any suggestion
6 to you whatever, but I do say this: That regardless of how
7 he comes out, Silverman is an extremely intelligent person
8 he considered every question that was put to him very carefully
9 and he articulated his responses with consummate care and
10 I respectfully suggest that regardless of what else he may
11 be he is a very intelligent person.

12 I think I have covered these, but these are
13 requests that have been made in behalf of the defendant and
14 I want to be sure that I am making them because I promised
15 I would. Mere presence at the scene of a crime, even when
16 coupled with knowledge that at that moment a crime is
17 being committed is insufficient to prove aiding and
18 abetting or membership in a conspiracy.

19 Even though you believe beyond a reasonable
20 doubt that the defendant knew or was aware of the alleged
21 drug transaction in which Stephen Silverman participated,
22 unless you find beyond a reasonable doubt that the defendant
23 participated in, promoted the venture or had a stake in its
24 outcome, the verdict must be not guilty.

25 Guilt may not be inferred by mere association

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2 with a guilty party.

3 On our oath as jurors you cannot allow
4 consideration of the penalty which may be imposed upon the
5 defendant if he is convicted to enter into your deliberations
6 or influence your verdict in any way. The duty of imposing
7 sentence in event of conviction is a very heavy responsibility
8 which rests solely upon my shoulders and it is a responsibility
9 for the Court with which you should not be concerned. Your
10 verdict should be unanimous. You should be unanimous with
11 respect to each and every count. Your verdict should be
12 guilty or not guilty with respect to each and every count.

13 You may return a verdict of guilty or not guilty
14 with respect to counts one, two and three. Each verdict in
15 its unanimity should represent the conscientious determination
16 of each and every one of you. The essence of the jury function
17 is conscientious explaining and conscientious listening.
18 There is no room in the jury room for somebody who wants
19 to take charge or somebody who is passive and becomes a
20 wallflower. You should be patient and anxious and willing
21 to listen. You should be anxious and willing to explain your
22 point of view, to understand the point of view of your
23 fellow jurors and you should do all of this in an atmosphere
24 of calm, without favor, without prejudice. This is an
25 important decision you are about to make, ladies and gentlemen.

1 Eopa

2 When you retire to consider your verdict in just a minute
3 or so you must forget us, all our personalities, the atmosphere
4 of the trial, because everything that we have done, everything
5 the lawyers have done, everything I have done, everything the
6 witnesses have said, that is all before you. We'll have
7 substantially accomplished our functions in the case and the
8 last final responsibility is with you.

9 Remember that your verdict should be consonant
10 with the truth as you find it. If it is, then justice will
11 have been done. If it is not consonant with the truth as
12 you have found it, then something else has happened.

13 Start with the facts that you consider to
14 be undisputed or readily resolved and work from them to the
15 more troublesome facts in the case. If you want any testimony
16 read, that will be done at your request. If you want any
17 exhibit, I will give you the exhibit list and the indictment,
18 you can send for any exhibit that you want to look at.

19 Please do not be swayed by sympathy or
20 emotion. Do not speculate evidence into the case. It is
21 this evidence, this body of evidence that counts and upon
22 which your judgment must rest. You are not here to solve
23 a riddle. You are not here to supply links in a factual chain
24 of evidence. The evidence is all before you and it is this
25 evidence and this evidence alone which must be the basis for your

1 conclusion.

2 If anything I have said proves to be troublesome
3 or complicated while you are working with the case, don't
4 give yourselves legal advice. It is one of the worst traps
5 a jury can fall into. Please ask me for any amplification
6 or clarification of the charge which you want and I will
7 be glad to serve you and I will be at your service throughout.

8 I want to thank the alternate jurors, Lillian
9 Seiman and Martha Bailey for their attendance and their
10 attention. The law requires a verdict to be a verdict of a
11 jury of 12 and for that reason you are excused with my thanks.

12 I suggest that when the jury retires that you
13 take out any personal belongings you may have and leave at
14 that time before they begin to deliberate.

15 If the lawyers will please step up.

16 (At the side bar.)

17 MR. HAFETZ: Your Honor, may I respectfully
18 request that the jury go out. I have an awful lot to say.
19 That was the most unfair charge I have ever heard in my
20 entire existence. You cut out the heart of the entire
21 defense and I wish to make that point for the record.

22 (In open court.)

23 THE COURT: Ladies and gentlemen, this may
24 take a few minutes, would you be good enough to withdraw,
25 please, and not deliberate until I call you back.

(Jury left the courtroom.)

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THE ADDITIONAL CHARGE

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2 THE COURT: I told the jury that all the
3 evidence was before them and they should consider all
4 of the evidence. I told them that all the arguments of
5 counsel were before them and they should consider all the
6 arguments. Now, I can't do more than that. I am not
7 supposed to adopt your theories and to spin out your
8 solutions for what you consider to be the real truth in the
9 case.

10 You are casting me in a role which I am not
11 supposed to play.

12 MR. HAFETZ: Exactly, your Honor.

13 THE COURT: Then I am glad. Call in the jury.
14 Is there anything else you want to say?

15 MR. HAFETZ: Can I have just one minute.

16 Nothing else.

17 THE COURT: All right, call in the jury.

18 (Jury present.)

19 THE COURT: Ladies and gentlemen of the jury,
20 I am very dismayed because I have apparently given at least
21 one of the attorneys the impression that I am trying to take
22 the case away from you. I have no such intention, ladies
23 and gentlemen, I have great respect for jury verdicts
24 and regardless of what your verdict is going to be at the
25 end of this deliberation, I am going to thank you for it because

1 Eopa

2 you have paid close attention and you have been very conscientious
3 I told you before and I tell you now that all of the evidence
4 is before you, not just the parts that I have referred to.
5 All of the arguments of counsel are before you, every argument
6 made by Miss Harris, every argument made by Mr. Hafetz. I
7 haven't taken any of those arguments away from them and I
8 haven't ruled any evidence out of the case.

9 Obviously if I had reviewed every bit and piece
10 of evidence in this case and tried to analyze it for you
11 and if I had picked up every argument made by counsel and
12 tried to analyze that for you, I would be talking until
13 Monday morning. I couldn't possibly do it.

14 I have picked out bits and pieces of evidence
15 only as illustrative of points I was trying to make under
16 the law. That is all I was trying to do.

17 I haven't tried to take the case away from you
18 and I don't want to take the case away from you. If you think
19 that anything that I have said is some kind of a covert
20 message that you should find this way or that way on any
21 evidence in this case, please disregard what I told you. It
22 would be a terrible burden for me to feel that I have given
23 anyone of you ladies and gentlemen the impression that I
24 have slipped into the jury box as a phantom juror and said what
25 I have said from the beginning I don't want to do. I have

1 Eopa

2 no intention of doing and I hope I never will do it and
3 I certainly don't want to start in this case.

4 Now, on Silverman, this Stephen Silverman.
5 Obviously he had a motive to lie. He had more than one
6 motive to lie. He had as many motives to lie as he had
7 federal offenses that he committed and he admitted on the
8 stand any number of offenses that he committed, if you
9 accept his statements about the wheeling and dealing in
10 hashish.

11 If you think he lied and you didn't get the
12 truth from him, that is your privilege and your duty, but
13 please, don't permit me to govern your fact-finding conclusion
14 in any way.

15 I repeat, the evidence, all of it, is before you.
16 The arguments, all of them, are before you, and you are
17 entitled to the opinion that there is evidence in the case
18 far more important than any evidence to which I may have
19 referred and I didn't refer to all of the evidence. I
20 didn't even come close to referring to all of the evidence
21 in the case.

22 Swear in the marshals. I don't think I have
23 anything further to say, ladies and gentlemen, and be sure
24 that the jurors get a list of the exhibits and a clean copy
25 of the indictment.

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2 (Two marshals were duly sworn.)

3 THE COURT: All right, you may retire, ladies
4 and gentlemen.

5 (The jury retired to deliberate at 3:45 P.M.)

6 (Time noted: 4:55 P.M.)

7 (In open court, jury present.)

8 THE COURT: All right.

9 THE CLERK: Members of the jury, please
10 answer to your presence as your name is called.

11 (Roll called; all jurors present.)

12 THE CLERK: Madam Foreman, has the jury agreed
13 upon a verdict?

14 THE FORELADY: They have.

15 THE CLERK: How do you find as to count one?

16 THE FORELADY: Guilty.

17 THE CLERK: How do you find as to count two?

18 THE FORELADY: Guilty.

19 THE CLERK: And as to count three?

20 THE FORELADY: Guilty, possession only.

21 THE CLERK: Thank you.

22 Members of the jury, listen to your verdict
23 as it stands recorded. You say you find the defendant guilty
24 on count one, guilty on count two and guilty on count three
25 possession only and so say you all.

**COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

- against -

RICHARD WIENER,

Defendant-Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York**

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the **8th** day of **August** 19**75** at **1 St. Andrews Place, N.Y., N.Y.**

deponent served the annexed *Appendix* upon

Paul J. Curran

the ~~XXXX~~ Attorney in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me, this **8th**
day of **August** 19 **75**

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977